IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5787 OF 2003

1. Suresh Waman Bhat (Mule) .... Petitioner & anr

Versus

Sou. Ranjana Sudhakar Ugale .... Respondent

Mr Anil Kumar Patil for Petitioner

CORAM : A.S.Oka, J

DATE: 10th December, 2004

P.C.:

1. By an order dated 8th September, 2002 this court directed that notice be issued to the respondent for final disposal. Office noting shows that the respondent is served. Petitioners are original defendants and respondent is the original plaintiff.

2. A suit for injunction was filed by the respondent against the petitioners. The respondent prayed that the petitioners be restrained by an order of temporary injunction from

demolishing the southern side wall running in east west direction. The petitioners filed their written statement and counter claim. In the counter claim, a contention was raised by the petitioners that while carrying out the construction in his own property, the respondent has encroaoched upon the property of the petitioner to the extent of 3 to 4 feet by constructing a slab and RCC gallery. The RCC gallery is on the toilet block of the Petitioner. Therefore a prayer was made for mandatory injunction against the respondent for removal of encroachment and for restoration of the pathway which was available to the petitioner. The petitioner made an application for appointment of Commissioner in which a prayer was made for appointing a Commissioner for inspection to find out the measurements of a new construction made to ascertain whether there are windows in the property and whether the slab constructed by the respondent is on the toilet block of the petitioner and for preparation of sketch. By the impugned order dated 1st November, 2002 the trial court rejected the application by holding that the suit property is only a wall between the property bearing survey no.373 and 374 and there was no issue relating to the house constructed by the respondent. On this ground, an application for appointment of a Commissioner was not granted.

3. Mr. Anil Kumar Patil learned counsel for the petitioner submitted that the trial court has totally ignored that the counter claim was filed and issues were framed pertaining to the structure erected by the respondent. He therefore submitted that order of the trial court shows non application of mind and deserves to be set aside in this petition.

4. I find considerable substance in the submission. From the impugned order, it appears to me that the trial court proceeded on an erroneous assumption that the dispute involved in the suit is only as regards the wall. The trial court has totally ignored that a counter claim was filed for seeking a mandatory injunction and removal of encroachment allegedly made by the respondent. Moreover, an Issue No. 4 is already framed by the trial to the effect as under :

> " Do defendants prove that plaintiffs have carried out construction in their property ?

5. Considering this position, it is a clear case of non application of mind by the trial court. If the counter claim filed by the petitioner and the issues which are framed are considered, it is crystal clear that a case of appointment of Commissioner was made out.

6. Hence, I pass the following order :

(i) The impugned order dated 1st November, 2002 is quashed and set aside and Application at Exhibit 20 made by the petitioner stands allowed. The trial court is directed to appoint anappropriate person as court Commissioner in terms of prayer made in the application at Exhibit 20.

(ii) Rule is made absolute. No order as to costs.

7. Parties to act on an authenticated copy of this order.

A.S.OKA, J